Book Review

The strategic utility of lawfare: Orde F Kittrie’s study of how international law can be weaponised

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Lawfare: A contested, contentious, and chameleonic concept

Lawfare is a term that is truly base, common and popular. From a commercial catchword used by travel agencies to sell cheap airfares to lawyers,¹ to a deprecatory word for the ‘individualistic and accusatorial aspects of law in Western societies,’² to the descriptor of joining transnational organisations in order to subvert the interpretations of law,³ to delegitimising strategies of weak actors in international forums who turn the law against the just and powerful actors,⁴ lawfare has multiple meanings depending on the context of its use. Yet for all its ordinary, contradictory and evolving usage, lawfare is amenable to principled definition, practical elaboration and strategic utilisation for national security. However, some commentators are less optimistic; they contend that lawfare

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³ Liang Q and Xiangsui W, Unrestricted warfare: China’s masterplan to destroy America, Pan American Publishing Press, Panama, 2002, xii.
is an ‘essentially contested concept’\(^5\) with ‘no useful or practical purpose’.\(^6\) Orde Kittrie’s book, *Lawfare: Law as a weapon of war*, is a systematic refutation of this scepticism, and presents a compelling counter-narrative of how legitimate legal tools have been and can be effectively used as a complementary means to accomplish military objectives.\(^7\)

**Clarifying lawfare: Conceptual elaboration and practical illustration**

Setting out to better clarify lawfare and strongly advance its potential utility for the United States of America (US), Kittrie offers a conceptual introduction to its meaning, variety, and power in four ways. First, he defines lawfare as intentionally ‘using—or misusing—law as a substitute for traditional military means to achieve a warfighting objective’.\(^8\) Second, he elaborates two constitutive elements of lawfare: (a) its effects must be the same as or similar to those traditionally sought from conventional military action; and (b) it must intend to weaken or destroy an adversary.\(^9\) Third, Kittrie emphasises that lawfare is a ‘value-neutral’ concept, meaning that it is ‘intrinsically neither good nor bad’.\(^10\) Fourth, he specifies two interrelated forms of lawfare: instrumental lawfare and compliance-disparity leverage lawfare. He further explains that the former refers to the deliberate employment of legal tools to create or enforce legal obligations so as to achieve strategic objectives that often require military action, while the latter entails the exploitation of an adversary’s greater commitment to the law to gain an unjust advantage, even while violating the law of armed conflict.

Kittrie’s conceptual determinations on lawfare at first glance seem abstract or theoretical. Yet, in what is a key strength of his work, he uses actual manifestations of lawfare in practice to demonstrate the converse. For instance, to illustrate instrumental lawfare, Kittrie cites the 2012 use by the United Kingdom of its law to prevent the shipment of Russian helicopter gunships bound for Syria’s

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Bashar Assad regime.\textsuperscript{11} Another example is the use by the Palestinian Authority (PA) of its United Nations Educational, Scientific and Cultural Organisation (UNESCO) membership to secure the cessation of Israeli attacks by claiming that these threatened the Church of the Nativity, a PA-administered World Heritage site.\textsuperscript{12} To illustrate compliance-disparity leverage lawfare, Kittrie refers to the repeated use by Hamas of protected civilian objects like hospitals, mosques or schools as weapon storage sites, \textit{de facto} headquarters and fighting positions.\textsuperscript{13} Hamas uses these protected facilities ‘to deter Israeli attacks’ and also as bait, whereby in the event of Israeli attacks, the resulting carnage is documented, broadcasted and exploited to the ‘information operations’ benefit of Hamas.\textsuperscript{14}

Kittrie ably demonstrates how lawfare is inclusive as regards its participants, involving both state and non-state actors. A remarkable insight that is illustrated through fascinating case studies of private law suits in US courts against terrorist groups, their state sponsors and other facilitators is that non-state actors may well be more effective than states in deploying lawfare strategies. A case in point is how, given the reluctance of US officials to prosecute Hamas operatives who had killed David Boim, an American citizen, two attorneys deployed strategic private civil litigation\textsuperscript{15} to shut down a US-based charity alleged to have funded Hamas.\textsuperscript{16} Also, focusing on the use of the Anti-Terrorism Act\textsuperscript{17} and the state sponsor of terrorism exception to the Foreign Sovereign Immunities Act,\textsuperscript{18} Kittrie analyses the innovative ways in which US private sector and non-governmental organisation (NGO) lawyers have utilised multiple legal tools to wage the most effective and creative lawfare in the US against America’s State and non-State enemies.\textsuperscript{19} More importantly, Kittrie points out that private lawfare can also be beneficial to national security, and goes further to articulate how it can be operationalised.\textsuperscript{20}

\textsuperscript{11} Kittrie, \textit{Lawfare}, 2.
\textsuperscript{12} Kittrie, \textit{Lawfare}, 233.
\textsuperscript{13} Kittrie, \textit{Lawfare}, 285.
\textsuperscript{14} Kittrie, \textit{Lawfare}, 285.
\textsuperscript{15} \textit{Boim v. Holy Land Foundation for Relief and Development} (2008), United States Circuit Court.
\textsuperscript{16} Kittrie, \textit{Lawfare}, 59.
\textsuperscript{17} Act of 1987, 22 USC §§5201-5203.
\textsuperscript{18} Act of 1976, 28 USC §§ 1330-1611.
\textsuperscript{19} Kittrie, \textit{Lawfare}, 81.
\textsuperscript{20} Kittrie, \textit{Lawfare}, 88.
On the strategic use and abuse of lawfare by state and non-state actors

Economic sanctions have long been used by the US to prohibit trade between persons in the US and foreign adversary states, as well as non-state entities. Such measures are, however, distinct from financial lawfare, which, though related, is a much broader and more aggressive means of ‘leveraging US law and jurisdiction to disrupt trade between foreign adversaries and foreign entities in third States’. Describing financial lawfare as the ‘US Government’s most systematic, sustained and impactful deployment of lawfare’, Kittrie analyses how it has been used to disrupt Iran’s uranium enrichment programme, as well as its support for anti-Israeli militant activity. Through a raft of complex legislation and executive orders targeting businesses that traded with Iran, the US Government offered companies a stark choice: either to do business in the US or with Iran. This caused individuals and corporations to take measures to disengage from business dealings with Iran. As a result, foreign investment in Iran dwindled, and the seizure of Iranian assets in foreign banks restricted Iran’s access to US dollars to finance its nuclear proliferation project and the activities of Hamas.

A key underlying theme in Kittrie’s analysis is the need to sound a clarion call to US authorities on the urgent need to develop their lawfare capabilities. Lamenting the lack of a systematic approach to lawfare by the US, he makes a good case by contrasting US practice with that of the People’s Republic of China. Unlike the US, China has a long tradition of State-backed lawfare as a core component of its military strategy. It pursues a more institutionalised approach to lawfare, translated as ‘falu zhan’, deploying it as a foreign policy tool and as a means to shape customary international law. Kittrie details how China has taken calculated steps to promote its preferred interpretations of international law that conform to its strategic goals to the detriment of others, particularly in relation to maritime, aviation, outer space, and cyberspace law. Most dramatic is the way China has deployed specious legal arguments to advance its expansionist claim

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21 Kittrie, Lawfare, 114.
22 Kittrie, Lawfare, 10.
23 Kittrie, Lawfare, 117.
24 Kittrie, Lawfare, 122.
25 Kittrie, Lawfare, 161.
26 Kittrie, Lawfare, 8.
27 Kittrie, Lawfare, 163.
28 Kittrie, Lawfare, 165.
of sovereignty over the islands in the South China Sea and the adjacent waters. However, China’s limited success in this regard casts doubt on Kittrie’s suggestion that China is the preeminent lawfare power.

The comparative utility of the Chinese lawfare experience is complemented by a more extensive analysis of how lawfare has been used by various actors in the Israel-Palestine conflict. This is particularly beneficial given the ‘cutting-edge sophistication, intensity, and variety of lawfare’ utilised in that conflict. Kittrie begins by exploring the use by the PA of legal strategy as a weapon against Israel, and Israel’s reaction. The PA has exploited the legal avenues for seeking full Statehood and UN membership outside the peace negotiation process, as well as accession to the Statute of the International Criminal Court to bolster its position in the Israeli-Palestinian conflict. While it may be doubted that these measures of the PA constitute lawfare as defined by Kittrie, it is nevertheless clear that they yielded results which would have otherwise required nothing short of military force. For instance, in return for an eight-month reprieve on the use of international organisations and treaty processes to attack Israel, the PA secured the release of seventy-eight of its fighters from Israeli detention. As well as the PA’s use of its UNESCO membership against Israel, Kittrie also cites the Wall Advisory Opinion of the International Court of Justice as yet another significant instance of lawfare. However, this is neither supported by a holistic assessment of the opinion’s politico-legal history nor its impact on Israeli operations.

Palestinian NGOs and their allies have likewise waged lawfare against Israel in three main ways: (a) the boycott, divestment, and sanctions (BDS) movement; (b) the use of universal jurisdiction statutes of foreign states against current and former Israeli officials; and (c) legal actions against foreign companies for allegedly aiding and abetting Israeli war crimes. The BDS effort follows the same pattern as that used against South Africa’s apartheid regime, but its coercive force is being blunted by an equally determined counter-BDS legislative effort by Isra-

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30 The South China Sea Arbitration (Philippines/People’s Republic of China), Award, PCA (12 July 2016).
32 Kittrie, *Lawfare*, 201.
38 Kittrie, *Lawfare*, 263.
el. Lawfare through lawsuits against Caterpillar in the US, Veolia Transport in France, and Riwal in the Netherlands are perhaps the most significant in terms of coercive effect. Concerned more about reputational costs than the merits of the lawsuits, these companies elected to discontinue business with Israel, thereby severely impacting the supply of essential military equipment.

Not one to be easily outdone, Israel has also deployed lawfare against its adversaries and their allies in order to achieve operational objectives. A key component of Israel’s security régime in the Occupied Palestinian Territory is the maintenance of a maritime blockade to restrict the movement of goods. Following the 2010 breach of the blockade by the MV Mavi Marmara flotilla, Israel was determined to prevent a repeat in 2011. Thus in collaboration with Shurat HaDin, an Israeli NGO, Israel utilised Greek law to prevent a Gaza-bound flotilla from leaving Greece by dissuading maritime insurance companies and satellite providers from serving the flotilla. Israel’s claim was that transacting with organisers of the Gaza-bound flotilla, possibly laden with weapons, was equivalent to material support to terrorists and could attract civil liability for future attacks. A second joint effort between Israel and Shurat HaDin was a suit against Bank of China for transferring funds to terrorist groups, thereby facilitating subsequent attacks by those groups. This was, however, not effective and the victims’ and states’ changing priorities resulted in conflict and embarrassment. Nonetheless, it offered vital lessons on the ‘perils for both sides of public-private sector collaboration on lawfare’.

Concluding observations

Extensively researched and well written, Lawfare nevertheless fails to side-step a pitfall that traps many who comment on the Israeli-Palestinian conflict. Finding a neutral position in so contested a subject can be difficult, and this has implications for Kittrie’s work. Instrumental lawfare is sold as a value-neutral concept, but discussions and depictions of its uses in the book are redolent of the uncritical narrative that Israeli and American lawfare is just and legitimate,

39 Kittrie, Lawfare, 269.
40 Kittrie, Lawfare, 278.
41 Kittrie, Lawfare, 318.
42 Kittrie, Lawfare, 317.
43 Kittrie, Lawfare, 321.
44 Kittrie, Lawfare, 318.
while similar practice by Palestine and its allies is suspect and implicitly illegitimate. This detracts much from the alleged but potential neutrality of lawfare.

However, in a remarkable show of realism, Kittrie acknowledges the limitations of his work. This is clear from the content of the concluding chapter which sets out the critical legal questions that should guide subsequent research. In sum, these questions chart a clear path for further theoretical and empirical inquiry into the key lessons to be drawn from lawfare, and how such lawfare can be made more effective. While the specific points of the proposed inquiry are detailed and cannot be fully covered here, a common theme that can be noted from Kittrie’s concluding remarks is that those strategies which pursue legal processes to strengthen the rule of law, promote compliance with international humanitarian law and human rights law, and punish non-compliance should be promoted as legitimate lawfare. By contrast, those that primarily seek to cynically derive benefit from the adversary’s higher observance of the law distort the law of armed conflict, corrupt its rational logic of constraint, and must be rejected accordingly.

Overall, *Lawfare* is an in-depth and engaging book that will go a long way to induce all states to give serious thought to lawfare as an increasingly relevant aspect of modern military strategy. Broad in scope, meticulous in documentation, clear in explanation, and consistent in argument, *Lawfare* is poised to be a valuable resource for military and civilian policymakers, and also for practicing lawyers and their academic counterparts. With the growing realisation of the futility of waging kinetic warfare and how so little is accomplished at too great a cost of human lives and livelihoods, it is difficult to ignore the self-evident thrust of Kittrie’s argument that lawfare could almost certainly save lives by enabling certain national security objectives to be advanced with less or no kinetic warfare. This argument that encapsulates the core thesis of his book is convincing as it resonates with both the imperatives of humanity and the logic of military necessity, the balance of which enables war to be governed by law.